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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1851

THOMAS ALLEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Thomas Allen, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in this proceeding on April 26, 1977, affirming in part the judgment of the United States District Court for the District of New Mexico.

OPINIONS BELOW

The opinion of the court of appeals, not yet reported, is attached hereto as Appendix A, pp. 1a-25a, *infra*. The unpublished order of the district court denying petitioner's motion for a new trial is attached hereto as Appendix B, pp. 26a-29a, *infra*.

JURISDICTION

On April 26, 1977, the United States Court of Appeals for the Tenth Circuit entered its judgment (Appendix C). The time for filing this petition was extended, by order of the Honorable Byron S. White, Circuit Justice, to and including June 25, 1977. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Where a plainly substantial defense is neither investigated nor raised because of defense counsel's neglect, whether a federal court, consistent with the Due Process guarantees of the Fifth Amendment and the right to counsel afforded by the Sixth Amendment, may deny defendant a new trial on the ground that to grant relief might place a premium on neglect and encourage the stratagem of withholding available defenses in other cases.

Whether a proper construction of the federal mail fraud statute, 18 U.S.C. § 1341 (1970), makes the duration and extent of a fiduciary relationship relevant in determining the existence of a scheme to defraud insofar as such scheme rests on an agent's failure to disclose material facts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

U.S. Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

18 U.S.C. § 1341 (1970):

> "Whoever having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

Statement of Facts.

Petitioner Allen and his wholly-owned corporation operated an oil and gas leasing service. The service assisted customers (players) who desired to participate in lotteries sponsored each month by the Bureau of Land Management for the purpose of allocating oil and gas leases. On August 2, 1974, Allen and his corporation were indicted on twenty counts of mail fraud, 18 U.S.C. § 1341, and aiding and abetting, 18 U.S.C. § 2, arising out of transactions between Allen and his customers (App. A, pp. 2a-3a).

In Counts I through VIII the Government alleged a scheme to defraud wherein Allen procured lease assign-

ments from his winning customers without disclosing to them that their leases were valuable and that, in some instances, he had already begun negotiations to sell the lease at a substantial profit. In Counts IX and X the Government alleged that in two instances where winning customers retained an overriding royalty interest in leases assigned to Allen, he later fraudulently induced these players to assign their overriding royalty interests to him. In Counts X through XX the Government alleged that Allen sold to his customers royalty deeds in the Cable Ridge oil field, that this field was not a valuable oil prospect, that Allen failed to disclose its lack of value, and that Allen misrepresented the oil potential of the field. (Vol. 31, pp. 2533-48.)

Trial began on January 6, 1975, and ended on January 24, 1975. Allen's defense was that the pertinent transactions occurred at arms' length and not while he was a fiduciary, that under these circumstances he was not required to disclose to his customers facts that the United States contended were material and that no scheme to defraud existed (Vol. 27, pp. 1770-72; Vol. 30, p. 2265; Vol. 20, p. 713; Vol. 31, pp. 2502, 2505). After trial counsel argued this theory to the jury, the trial court instructed the jury that the presence or absence of a fiduciary relationship was irrelevant and should not be considered in determining innocence or guilt.[1] No objection to this instruction was interposed by defense counsel. Thereafter, the jury convicted petitioner on each of the twenty counts.

Preparatory to the first sentencing proceeding, the trial court received a report from the probation office disclosing that Allen had an extensive history of severe psychosis. At this proceeding, Allen's trial counsel advised the court:

[1] The text of the court's instruction on this point is quoted at page 16-17, *infra*.

> "The problem is that I had not realized until I saw the report of the doctor, the seriousness of this matter and what the situation actually was with reference to Mr. Allen's health. Had I known, I might say, I believe that my judgment would have been to waive a jury trial and try the case to the Court on an entirely different basis than that upon which we proceeded, but we were not aware of the situation detailed in the doctor's report until we just saw that report at the same time the Court and Probation Officer received it." (App. A, p. 5a n.5.)

The trial court sentenced Allen to five years imprisonment on Count I and deferred sentencing on remaining counts so that petitioner could be remanded to a medical facility at Springfield, Missouri, for observation (Vol. 1, p. 133; Vol. 5, p. 5).[2] Thereafter, trial counsel filed a timely notice of appeal to the Tenth Circuit on behalf of Allen, but failed to file such a notice on behalf of Allen's corporation (App. A, p. 2a n.1).

Allen retained new counsel who later moved to have the corporation included as an appellant. The district court denied the motion stating that "the facts which [trial] counsel represented in his affidavit are inherently improbable. [Trial] counsel simply neglected to appeal the judgment against the corporation." (Supp. Vol. 1, pp. 20-21.)

Allen also moved for a new trial based on newly discovered evidence of insanity[3] and ineffective assistance

[2] Ultimately, Allen was sentenced to two years imprisonment and a $1,000 fine for each count, the prison sentences to run concurrently (App. A, p. 3a).

[3] In the Tenth Circuit diminished capacity and insanity are separate and complete defenses to crimes requiring specific intent. *United States* v. *Trujillo*, 497 F.2d 408, 409 (10th Cir. 1974); *Wion* v. *United States*, 325 F.2d 420, 430 (10th Cir. 1963), *cert. denied*, 377 U.S. 946 (1964). For brevity we refer here to both defenses as "insanity."

of counsel (App. A, p. 5a). In support of that motion, Allen's new counsel tendered affidavits including the affidavit of a psychiatrist who had placed Allen in a mental hospital and treated his mental illness prior to, during and after the events for which Allen was convicted (*id.* at 5a-6a n.6).

The phychiatrist's affidavit shows that between April 21, 1970, and May 2, 1973, when the allegedly unlawful uses of the mails occurred, Allen was thrice confined in mental institutions and throughout this entire period was undergoing etxensive psychiatric treatment (*id.*). Indeed, the affidavit shows:

(1) That Allen was hospitalized for treatment of a severe phychosis from April 1, 1970, through May 23, 1970; from August 30, 1970, through December 16, 1970; and from April 2, 1971, until June 1, 1971;

(2) That the "scheme" involving Counts I through VIII was allegedly formed during Allen's first hospitalization;

(3) That five counts of mail fraud occurred while Allen was actually hospitalized for treatment (Counts II, IV, V, XVII, and XVIII);

(4) That seven other counts occurred within 45 days of a forthcoming confinement (Counts XII (45 days), XIII (44 days), VIII (37 days), XIV (25 days), XV (23 days), XVI (16 days), and VII (7 days));

(5) That four other counts occurred within 80 days of a forthcoming confinement (Counts XI (80 days), III (71 days), XIV (64 days), XX (56 days));

(6) That Allen was being treated with anti-psychotic drugs throughout the period of April 24, 1970, to May 2, 1973;

(7) That electroshock treatments were administered to him during his two confinements in 1971;

(8) That the effect of electroshock treatments during these two confinements would be to induce total amnesia for a period commencing approximately in July 1970 and continuing until approximately December 1971; and

(9) That when the "crimes" were committed, Allen lacked the capacity to appreciate the criminality of his conduct and the capacity to conform his conduct to the requirements of the law and thus was legally insane. (See Appendix A, pp. 5a-6a nn.6 & 7, and Appendix D, pp. 32a-34a, *infra.*)

The chronological relationship between the transactions for which Allen was convicted and his hospitalizations and medical treatment are more fully charted in Appendix D hereto.

Order of the District Court Denying Motion for New Trial.

The district court found that approximately four months before trial, Allen's counsel had moved to continue a pretrial hearing because Allen was hospitalized in Minnesota and was "physically and emotionally unable to attend a hearing at that time."[4] (App. B, p. 28a.)

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[4] Prior to trial, the court admonished defense counsel to report on petitioner's competence to stand trial. The court said:

> "I've had a little trouble up to this point in getting the attention of the defense. Mr. Allen was arraigned in August, early August. The matter was set for trial then, I asked Mr. Otto to get me the reports in connection with his health, which he represented to me as extremely bad, state of mind as being extremely bad, and I still don't have complete reports in connection with Mr. Allen's condition.
>
> * * * *
>
> "I can't let this thing drag on. If the man is sick, he ought not to be tried. If he isn't sick, we ought to get this matter out as soon as we possibly can and get it disposed of not only for the benefit of the Government, but also for the benefit of Mr. Allen; and the longer it drags on, why the worse it is on both sides." (Vol. 11, pp. 23-24.)

In response, the district court directed counsel to report on Allen's physical and mental condition, and prior to trial, counsel filed a copy of a letter from Allen's psychiatrist, Dr. Winston L. Martin, dated September 6, 1974 [5] (*id.*).

Rather than ordering a new trial on the grounds of ineffective assistance of counsel, as Allen requested, the district court ruled that a "new trial should not be granted because the evidence should have been discovered prior to trial through the exercise of due diligence by Mr. Allen or his attorneys." (*Id.* at 27a.)[6] The trial court also said that "Even assuming it is in the nature of Allen's illness to attempt to conceal its nature and severity,[7] there is no contention that his attorneys or Dr. Martin labored under the same handicap." (*Id.* at 28a.)

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[5] The letter, as described by the court of appeals, gave a diagnosis of "'Manic Depressive Reaction'" and "said that defendant has experienced both manic and depressive episodes, the depression being more 'frequent and devastating;' that in depression Allen becomes withdrawn, experiences overwhelming emotional anxiety, and 'is essentially not able to function in any meaningful capacity'; that if Allen is again depressed and if he had to appear in court, 'he in no way could intellectually function in his own behalf . . . .'" (App. A, p. 7a.)

[6] Prior to trial, Allen's principal trial counsel underwent surgery. According to affidavits of counsel's physicians, Allen's principal counsel was incapacitated from October 11, 1974, to January 1, 1974. (Vol. 1, pp. 62-63.) Allen's trial began five days thereafter, January 6, 1975, and ended on January 24, 1975. During the trial, counsel was granted leave to conduct his examinations while seated because he had not fully recovered from his recent surgry. (Vol. 27, p. 1694.)

[7] Dr. Martin's post-trial affidavit confirmed that Allen did not comprehend the effects caused by his mental illness upon his actions, would not have believed that he had done anything wrong and would not have attributed his actions to his mental illness (Martin Affidavit, ¶ 5 and p. 4).

Opinion of the Court Of Appeals

The court of appeals reversed Allen's conviction on five counts (I, II, III, V, and VII) because of a failure of proof and affirmed his conviction on the remaining fifteen counts. Its opinion recites in detail the salient facts establishing Allen's claim of ineffective assistance of counsel (see App. A, pp. 4a-7a). Moreover, the court of appeals—in a conclusion of utmost importance to this case—determined that "a factual basis for a *substantial* insanity defense was developed in the post-trial affidavits of Dr. Martin and the psychologist." (*Id.* at 8a; emphasis supplied.) The court concluded further that "Dr. Martin's [pre-trial] letter put before counsel the basic facts of Allen's hospitalization . . . ." (*Id.* at 8a-9a.)[8]

Notwithstanding these conclusions, the court of appeals held that petitioner's claim of ineffective assistance of counsel was properly rejected by the district court because:

> "It seems clear that despite the awareness by defendant and his counsel of the mental problem, it was simply not presented as a defense. To grant a new trial on a claim of ineffective counsel on this record would *put a premium on neglect and would encourage a strategy of not making use of available information*, with the thought that its later 'discovery' might be the basis for a new trial if the verdict was adverse." (*Id.* at 11a; emphasis added and citations omitted.)

The court of appeals further held that the Government did not need to prove the existence of a fiduciary re-

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[8] Martin's pre-trial letter dated September 6, 1974, is responsive to the issue of Allen's competency to stand trial at that time. In this connection, the letter also mentions that Allen was hospitalized twice in 1970 and once in 1971. The letter does not indicate the length of these confinements in a mental hospital nor the nature of treatment administered to him, such as electroshock treatment.

lationship in order to establish that nondisclosure of information is fraudulent within the meaning of 18 U.S.C. § 1341 (App. A, p. 22a). As to petitioner's alternative argument—*i.e.*, that the absence of a fiduciary relationship is a defense insofar as the scheme to defraud rests on nondisclosure of facts—the court said only:

> "The instruction ruling out consideration of whether a fiduciary duty existed was not error here, although the issue could be germane and thus require a different instruction in other circumstances." (*Id.* at 24a.) [9]

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' JUDGMENT AFFIRMING PETITIONER'S CONVICTION, NOTWITHSTANDING TRIAL COUNSEL'S NEGLECT IN FAILING TO INVESTIGATE AND RAISE AN INSANITY DEFENSE, WARRANTS REVIEW BY THIS COURT.

Federal and state courts, as we show below, are badly divided over the proper standard to be applied in determining whether errors of counsel constitute a violation of the defendant's right to adequate assistance of counsel in a criminal proceeding.[10] Generally speaking,

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[9] The court did not refuse to consider the instruction issue on the ground that no objection was made pursuant to Rule 30, Fed. R. Crim. Proc., apparently acknowledging that the issue affected substantial rights within the meaning of Rule 52(b), Fed. R. Crim. Proc.

[10] This Court has not determined the appropriate standard by which claims of ineffective assistance of counsel are to be reviewed. The Court, however, has made clear that an accused in a criminal justice proceeding has the right to adequate or effective representation. *E.g.*, *Powell* v. *Alabama*, 287 U.S. 45, 53 (1932); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *McMann* v. *Richardson*, 397 U.S. 759, 771 n.14 (1970); *Tollett* v. *Henderson*, 411 U.S. 258, 266 (1973).

federal and state courts review claims of ineffective assistance of counsel under either a "farce and mockery" standard or a "reasonable competence" standard. In the instant case, the Tenth Circuit has introduced a new standard that authorizes district courts to reject claims of ineffective assistance of counsel regardless of the magnitude of counsel's error or the prejudice suffered by defendant. Moreover, the judgment of the court insofar as it affirms petitioner's conviction on fifteen counts is plainly wrong. For these reasons, which are more fully discussed below, review by this Court on writ of certiorari is warranted.

The United States Courts of Appeals apply significantly different standards when reviewing claims of ineffective assistance of counsel. The Third, Fourth, Fifth, Sixth, Seventh and District of Columbia Circuits have adopted a standard of reasonable competence, albeit formulated in different terms from circuit to circuit. See *Moore* v. *United States*, 432 F.2d 730, 736-37 (3d Cir. 1970) (en banc); *Coles* v. *Peyton*, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968); *West* v. *Louisiana*, 478 F.2d 1026, 1033 (5th Cir. 1973); *Beasley* v. *United States*, 491 F.2d 687, 693, 696 (6th Cir. 1974); *Williams* v. *Twomey*, 510 F.2d 634, 640-41 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975); *United States* v. *DeCoster*, 487 F.2d 1197, 1202 (D.C. Cir. 1973), *remanded and now pending rehearing en banc* on appeal (No. 72-1283).

On the other hand, the First, Second, Eighth and Ninth Circuits generally adhere to a "farce and mockery" standard—*i.e.*, whether defense counsel's ineptness rendered defendants' trial a "farce and mockery." *United States* v. *Madrid Ramirez*, 535 F.2d 130 (1st Cir. 1976); *United States* v. *Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974); *Rickenbacker* v. *Warden*, 550 F.2d 62, 65-66 (2d Cir. 1976); *McQueen* v. *Swenson*, 498 F.2d 207, 214-

15 (8th Cir. 1974); *United States* v. *Jones*, 512 F.2d 347, 349 (9th Cir. 1975). Until the instant appeal, the Tenth Circuit also applied a "farce and mockery" standard. *Lorraine* v. *United States*, 444 F.2d 1, 2 (10th Cir. 1971).

The conflict revealed in the opinions of the United States Courts of Appeals is replicated in opinions of the highest tribunals of the states. For example, Delaware, Idaho, Michigan and Wisconsin have adopted a reasonable competence standard, or variants thereof. *Harris* v. *State*, 293 A.2d 291 (Del. 1972); *State* v. *Tucker*, 97 Idaho 4, 539 P.2d 556 (1975); *People* v. *Strodder*, 394 Mich. 193, 229 N.W.2d 318 (1975); *State* v. *Harper*, 57 Wis. 2d 543, 205 N.W.2d 1 (1973). On the other hand, Alabama, Indiana, Mississippi, Oklahoma, South Carolina and Virginia adhere to a farce and mockery standard. *Boswell* v. *State*, 290 Ala. 349, 276 So.2d 592 (1973); *Maldonado* v. *State*, 355 N.E.2d 843 (Ind. 1976); *Parham* v. *State*, 229 So.2d 582 (Miss. 1969); *Glazier* v. *State*, 548 P.2d 668 (Okla. 1976); *State* v. *Lewis*, 255 S.C. 466, 179 S.E. 2d 616 (1971); *Hern* v. *Cox*, 212 Va. 644, 186 S.E.2d 85 (1972).

Neither of the generally prevailing standards for reviewing claims of ineffective assistance of counsel was applied by the court of appeals in the instant case. Rather, the court of appeals devised a test for reviewing claims of ineffective assistance of counsel that countenances errors of counsel which in other circuits would require a new trial even under a farce and mockery standard. See cases cited p. 14, *infra*. According to the Tenth Circuit, when counsel has neglected to raise a substantial defense, the district court may deny a new trial in order to avoid (1) putting "a premium on neglect," and (2) encouraging a "strategy of not making use of available information." (*Supra*, p. 9.)

The decision below rejects a premise that is central to both the farce and mockery and reasonable competence standards—namely that the greater the incompetence of counsel and the prejudice flowing from that incompetence, the more justice requires a new trial for the accused. Under the Tenth Circuit's test, relief is to be withheld in precisely those cases where the two prevailing standards would command it—*i.e.*, where counsel's representation of the accused has been patently incompetent and prejudicial. Indeed, the Tenth Circuit has developed a logic whereby the most ludicrous representation of the accused presents the least justifiable instance for granting a new trial since counsel should be deterred from engaging in such performance rather than be granted a "premium" in the form of a new trial for his client.

The Tenth Circuit's test is much too narrow to safeguard the constitutional right of the accused to effective representation in a criminal proceeding. The thrust of the Tenth Circuit's rule is to deter incompetent representation in later cases by refusing to grant redress to the victim of such incompetence who currently appears before the court. In result, while attorneys are the targets of the Tenth Circuit's rule, their clients who have been inadequately represented are the persons punished by its application. In short, the test announced in the court below reads the right to effective assistance of counsel out of the Constitution because it fails to focus on the magnitude of counsel's blunders and the prejudice suffered by his client.

Moreover, for its first result, the standard of the Tenth Circuit has produced a decision that is plainly wrong. In this case, criminal punishment is to be meted out to an individual for "crimes" of specific intent [11]

[11] Specific intent to defraud is an element of mail fraud. *Hofmann* v. *United States*, 353 F.2d 188, 190 (10th Cir. 1965); *United States* v. *Kyle*, 257 F.2d 559, 564 (2d Cir. 1958).

committed while he was hospitalized and undergoing electroshock treatments. This result is repugnant to our system of criminal justice and becomes all the more unacceptable in light of the findings of the courts below that the failure to raise the defenses of insanity and diminished capacity was attributable to the neglect of defense counsel. Even under a farce and mockery standard, courts have ruled that where a defendant is deprived of a substantial insanity defense because of his counsel's failure to investigate, the defendant has been denied effective assistance of counsel and is entitled to a new trial. *Andrews* v. *United States*, 403 F.2d 341, 343-44 (9th Cir. 1968); *Brubaker* v. *Dickson*, 310 F.2d 30, 37-39 (9th Cir. 1972); *In Re Saunders*, 2 Cal. 3d 1033, 88 Cal. Rptr. 633, 472 P.2d 921, 931-32 (1970). *Cf. Owsley* v. *Peyton*, 368 F.2d 1002, 1003 (4th Cir. 1966) (failure to raise accused's incompetence to stand trial).

The harshness of the Tenth Circuit's refusal to order a new trial is not ameliorated by any suggestion that trial counsel made a tactical decision not to raise diminished capacity or insanity. Neither of the lower courts could or did find that counsel was engaging in a stratagem. Allen's counsel, moreover, said that prior to sentencing he "had not realized . . . the seriousness" of Allen's illness and that he would have tried the case to the court "on an entirely different basis" if he had been aware of the facts contained in the doctor's report to probation authorities (App. A, p. 5a). So too, trial counsel's failure to file a notice of appeal for Allen's codefendant and counsel's failure to object to an instruction that scuttled Allen's principal defense corroborate the conclusion that counsel was inadequate rather than cunning.

In sum, the Tenth Circuit has announced a test that justifies withholding relief for ineffective assistance of counsel, no matter how egregious. Applying that test,

the court has affirmed a conviction that would be set aside by other courts for want of effective assistance of counsel. The court's decision, moreover, arises in an area of constitutional law where federal and state courts are divided over the standard to be applied in reviewing claims of ineffective assistance of counsel.[12] For these reasons, the judgment of the Tenth Circuit should be reviewed by this Court.

II. THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT THE NATURE AND DURATION OF PETITIONER'S FIDUCIARY RELATIONSHIP TO HIS ALLEGED VICTIMS WAS IRRELEVANT UNDER THE FEDERAL MAIL FRAUD STATUTE.

Allen's principal defense was as follows: First, that he in fact made no affirmative material misrepresentations, but merely failed to disclose facts that the Government contended were material, and, second, that since he did not have a fiduciary relationship with his alleged victims that required or created the expectation of full disclosure, his failures to disclose were not fraudulent and could not be part of a fraudulent scheme within the meaning of 18 U.S.C. § 1341.[13] The trial court's instructions erroneously dismissed the significance of the extent

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[12] There has been increasing professional concern that steps be taken to help assure clients that they will be adequately represented by their counsel. ABA Standards Relating to the Prosecution Function and the Defense Function (Approved Draft 1971); Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice*, 42 Fordham L. Rev. 227 (1973); Bazelon, *The Defective Assistance of Counsel*, 42 U. Cin. L. Rev. 1 (1973); Finer, *Ineffective Assistance of Counsel*, 58 Cornell L. Rev. 1077 (1973).

[13] Another strand of the defense in this case was that defendant had acted in good faith and with the honest belief that his actions were lawful and legitimate. The trial court instructed the jury on this defense. (Vol. 31, pp. 2555-57.)

of the fiduciary relationship from the jury's consideration, and this error warrants reversal by this Court.

For example, while the Government contended that in the first scheme Allen fraudulently purchased leases from his winning customers, witnesses testified that the extent of Allen's duty had been to select desirable parcels for bidding and to notify the winners. (Vol. 18, pp. 233-34, 253-54; Vol. 20, p. 713.) There was evidence from which the jury could conclude that these customers knew that Allen was not representing them after notification of the lottery results was given, that they were free to sell the leases to anyone, and that Allen was in the business of buying as low and selling as high as he could. (*E.g.*, Vol. 18, pp. 310, 384; Vol. 20, p. 763; Vol. 27, p. 1738.) In closing argument, trial counsel emphasized the arms-length nature of the purchase-sale transactions and argued that Allen had no duty to disclose. (*E.g.*, Vol. 31, pp. 2480, 2494-97, 2502-05.)

The trial court specially instructed the jury that "false or fraudulent representations" could be made "by statements of half truths *or the concealment of material fact*, as well as by affirmative statements or acts." (Vol. 31, p. 2553; emphasis added. See also Vol. 31, p. 2555.) Thus, although the Government's case rested in part on alleged affirmative misrepresentations, the court's instructions and the evidence left open the possibility that the jury might fail to be persuaded of such affirmative fraudulent conduct and still convict on the basis of the nondisclosure alone. Accordingly, it is of particular importance in this case that after instructing the jury on good faith defense, the trial court gave the following instruction:

> "There has been reference to the question of whether or not a fiduciary relationship existed between the defendants and their clients, and if so, whether defendants' actions breached the duties imposed by that relationship.
>
> "The concept of a fiduciary relationship is a concept of the civil, not the criminal, law. You are instructed not to consider it in determining the guilt or innocence of the defendants in this matter." (Vol. 31, p. 2557.)

This instruction undermined Allen's contention that the nondisclosures were not fraudulent because no fiduciary duty existed after notification of the lottery results and therefore no duty of disclosure as to subsequent transactions existed. Though the Government argued to the court of appeals that the breach of fiduciary duty was not an essential element of this case, its proof of a scheme to defraud hinged on the fact that Allen was the agent of the customers, and in a fiduciary relationship with them, at least with respect to the entering of the lottery and the award of leases. Plainly, the Government's theory, to the extent that it rested on nondisclosures and not affirmative misrepresentations, was that the nondisclosures were part of a fraudulent scheme that included Allen's role as agent of the customers. In such a case, the nature and extent of the fiduciary relationship that existed—and the extent to which a fiduciary relationship did not exist—was almost certain to be a pivotal consideration for the jury in determining whether a scheme to defraud was proven.

Contrary to the assertions in the instruction, fiduciary duty is not a concept limited to civil cases. As the court of appeals conceded, the breach of a fiduciary relationship may be the critical fact in a prosecution for mail fraud. See, *e.g.*, *United States* v. *Keane*, 522 F.2d 534, 545 (7th Cir. 1975); *United States* v. *George*, 477 F.2d 508, 512 (7th Cir. 1973); *Post* v. *United States*, 132 U.S. App. D.C. 189, 198-99, 407 F.2d 319, 328-29 (1968); *Shushan* v. *United States*, 117 F.2d 110 (5th Cir. 1941).

More important, however, the notion of fiduciary obligation and its absence bears directly on the issues that a jury must be permitted to address in determining whether Allen has violated the mail fraud statute. The Government was attempting to prove that petitioner had, in the words of the statute, "devised . . . [a] scheme or artifice to defraud." In an often cited passage, the Fifth Circuit has said:

> "The crime of mail fraud is broad in scope. [Citations omitted.] The fraudulent aspect of the scheme to 'defraud' is measured by a nontechnical standard. [Citations omitted.] Law puts its imprimatur on the accepted moral standards and condemns conduct which fails to match the 'reflection of moral uprightness, of fundamental honesty, fair play, and right dealing in the general and business life of members of society.' . . . This is indeed broad. For as Judge Holmes once observed, '[t]he law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity.' *Weiss* v. *United States*, 5 Cir., 1941, 122 F.2d 675, 681 . . . [other citations omitted]. All that is necessary is that it be a 'scheme reasonably calculated to deceive persons of ordinary prudence and comprehension.' [Citations omitted.]" *Blachly* v. *United States*, 380 F.2d 665, 671 (5th Cir. 1967).

But if the statute appeals to the "reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society," petitioner should have been entitled to attempt to persuade the jury that he did not breach any fiduciary relationship with his alleged victims, even though at times he had had certain fiduciary relationships with them. See *Epstein* v. *United States*, 174 F.2d 754, 766 (6th Cir. 1949) ("Assuredly, we must consider fraud in mail fraud cases according to the standard of what fraud is in civil cases.") Such an argument, by appealing to the jury's own understanding of fiduciary obligation and fair commercial dealings, partially refutes the existence of a fraudulent scheme, and might have served entirely to absolve petitioner, had the issue come down to the relevance of nondisclosure alone.

Contrary to the assertion of the court of appeals (App. A, p. 24a), the circumstances of the case made the termination of fiduciary obligations plainly relevant, and thus the instruction taking that issue out of the case erroneously deprived petitioner of a substantial right.

> "The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view the relation of the particular evidence adduced to the particular issues involved." *Bird* v. *United States*, 180 U.S. 356, 361 (1901), quoted in *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 409 n.22 (1947).

Given the importance of the federal mail fraud statute, this issue warrants consideration by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit should be granted and the judgment of that court reviewed on the merits.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 75-1873

[Filed Apr. 26, 1977]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THOMAS ALLEN,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

(D.C. No. CR-74-230)

William S. Dixon, Albuquerque, New Mexico (Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, New Mexico, on the brief) for Defendant-Appellant

Victor R. Ortega, United States Attorney, Albuquerque, New Mexico (Mark C. Meiering, Assistant United States Attorney, Albuquerque, New Mexico, on the brief) for Plaintiff-Appellee

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Before HOLLOWAY, McWILLIAMS and BARRETT, Circuit Judges

HOLLOWAY, Circuit Judge

Defendant Allen appeals his jury convictions on twenty counts charging violation of the mail fraud statute and causing the use of the mails therefor. 18 U.S.C.A. §§ 1341, 2. The Government's proof tended to show the following facts.

The Bureau of Land Management (BLM) controls the issuance of oil and gas leases on federal lands. 43 C.F.R. § 3100 *et seq.* Lands less valuable for oil and gas exploration are leased by simultaneous drawings. On the third Monday of each month the BLM posts a list of parcels which it proposes to lease by this procedure. Persons interested in a particular parcel must send in an application card, a $10 filing fee and a year's advance rental, computed at 50¢ an acre. An applicant may submit only one card per parcel, but may enter the drawings on more than one parcel. On the fourth Monday of each month all of the cards are put in a hopper and one is selected. The winner is entitled to a 10-year lease to drill for oil and gas, provided he pays the annual rental. If production is obtained during the 10-year period, the lease is extended. The Government is entitled to a 12½% royalty on production. The leases are assignable.

Defendant is president of Central Southwest Oil Corporation (Central),[1] a leasing service which assisted persons wishing to participate in the simultaneous drawings. Central advertised its services in national magazines and

[1] Central was also convicted under the same charges but did not timely file a notice of appeal.

sent information, including BLM application cards, to persons responding to the ads. If a person decided to participate in the drawings, Central handled the filing of application cards and fees with the BLM for a service charge.

The indictment filed in August, 1974, charged that Allen and Central had used the mails in the furtherance of three schemes to defraud involving (1) the assignment of customers' leases to Central (counts I-VIII); (2) the purchase by Central of overriding royalties retained by successful customers (counts IX-X); and (3) the sale by Central to customers of royalty deeds in a supposedly valuable oil prospect called "Cable Ridge" (counts XI-XX).

After a trial lasting three weeks, guilty verdicts were returned against both defendants on all counts. A final judgment was later entered fining defendant Allen $1,000 on each count and also sentencing him to two-years' imprisonment on each count, the sentences to run concurrently. This appeal followed. We will detail additional facts in discussing the issues raised on appeal.

I

The claim of ineffective assistance of counsel and Allen's competence to commit the offenses

Allen vigorously argues that his trial counsel's failure to investigate, prepare and assert insanity as a defense demonstrates such a deprivation of his Sixth Amendment right to effective assistance of counsel as to require reversal. Further he says that the trial court's denial of his motion for a new trial, which asserted this ground, was made without a hearing, and that if we believe additional evidence should be adduced on the issue, we should

remand for a plenary hearing where Allen, his physicians and his trial counsel could testify.[2]

Defendant's motion for a new trial essentially alleged these facts. Allen was suffering from a severe mental illness during the time of the offenses and not responsible for his actions; specific intent is an essential element of the crimes; and defendant was incapable of recognizing the importance of information concerning his mental illness and presenting it to the court. On the date of first sentencing,[3] one of defendant's retained trial counsel[4] stated that he had not been aware of the seriousness of defendant's mental illness until a post-trial report from Dr. Winston L. Martin was received by the probation officer, and that if he had known of this information, he

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[2] We note at the outset that defendant did not assert at the time of trial or in his motion for a new trial that he had been incompetent to stand trial in January, 1975. No such argument is made in defendant's appellate briefs and at argument before us counsel confirmed that no such contention is made.

We have had some concern whether the information before the trial court prior to trial required an examination, hearing and a determination on defendant's competency to stand trial. See Wolcott v. United States, 407 F.2d 1149 (10th Cir.), cert. denied, 396 U.S. 879. However, on examination of the record we are satisfied there was no error in this respect and none is claimed.

[3] In February, 1975, a first sentence on count I was imposed but the court deferred sentencing on counts II through XX for purposes of observation and study pursuant to 18 U.S.C.A. §§ 4208(b), (c) (R. I, 133). After such study and a report thereon, the court imposed the concurrent 2 year sentences and fines mentioned earlier. (R. I, 150).

[4] Two retained trial counsel worked together in defending Allen through the adverse verdict. After the first sentencing, new retained counsel (Mr. Higginbotham) represented Allen and appeared at the second sentencing and filed the motion for a new trial. Later, present retained appellate counsel assumed responsibility for the case.

would have tried the case on an entirely different basis.[5] The motion for a new trial, filed by other counsel employed by defendant, stated (R. I, 138):

> 5. Defendant's incapacity and ignorance resulting from his mental illness, place such information in the capacity of newly discovered evidence; or alternatively, newly discovered evidence resulting from ineffective counsel, so as to deprive the Defendant of his 6th Amendment constitutional rights to competent counsel in a fair and just trial.

In further support of the motion, new counsel, Mr. Higginbotham, submitted his affidavit. It said that defendant Allen had stated that he was not aware of the importance of the information for purposes of trial until so advised by Mr. Higginbotham.

An affidavit of Dr. Winston L. Martin, a psychiatrist, was also submitted. It incorporated a history of defendant's mental condition,[6] opined that Allen was mentally

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[5] The statement appears in the record of the first sentencing (R. XV, 2-3):

> I would say one thing about a comment that the Probation Officer made, that in light of what I now know, he indicated that the Defense apparently did not think that the doctor's opinion was important in the defense of this case. The problem is that I had not realized until I saw the report of the doctor, the seriousness of this matter and what the situation actually was with reference to Mr. Allen's health. Had I known, I might say, I believe that my judgment would have been to waive a jury trial and try the case to the Court on an entirely different basis than that upon which we proceeded, but we were not aware of the situation detailed in the doctor's report until we just saw that report at the same time that the Court and Probation Officer received it.

[6] Defendant was discharged from the service in 1944 with a service-connected psychotic condition, "Schizophrenic Reaction, Paranoid Type." He had several Veteran's Administration examinations in the next few years with a concluding 1955 diagnosis of "Schizophrenic Reaction, Chronic, Severe." Defendant was confined from April 1, 1970, through May 23, 1970, under Dr. Martin's

ill in a legal sense when the alleged crimes were committed,[7] and claimed that defendant's failure to bring his mental illness into perspective had been due to his not comprehending its significance.

A psychologist who conducted psychological testing of Allen also submitted an affidavit. His impression of Allen's condition was that of "Schizophrenic potential in a basically obsessive-compulsive character with some defensive decompensation and a pervasive use of denial." This report was based on an examination of defendant in June, 1975, almost five months after his trial.

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care. He did poorly after discharge and was readmitted to the hospital and remained there under Dr. Martin's care from August 30 to December 16, 1970. During this latter period he was given extensive electroshock treatments in an effort to control his mental illness. He appeared to be doing better but again became grossly psychotic and was readmitted as a patient under Dr. Martin's care from April 2 until June 1, 1971, and received a further course of electroshock treatments. On discharge, the doctor felt that Allen was improved but that his illness was not in a state of remission. (R. I, 145).

Dr. Martin continued in contact by occasional office visits, correspondence and by lengthy telephone conversations with Mr. Allen. By September, 1971, his schizophrenic process had again become severe and remained severe through August, 1974, when Dr. Martin had last corresponded with defendant. The doctor's opinion was that defendant had been suffering from his disabling psychotic process from the fall of 1968 through August, 1974. Further the doctor stated that, due to the electroshock therapy, defendant would have a period of "total amnesia (inability to recall any events)" from about July, 1970 to December, 1971. In connection with these dates we note that the period of offenses alleged by the indictment ran from April 24, 1970, through March 23, 1972. (R. I, 145, 147).

[7] He stated that during this time "Mr. Allen lacked the capacity to appreciate the criminality of his conduct or the capacity to conform his conduct to the requirements of law and that this type of intellectual incapacitation was the direct result of his psychotic process." (R. I, 145-46). Such incapacitation would come within the definition in this Circuit of lack of competence to commit the offenses. See Wion v. United States, 325 F.2d 420, 430 (10th Cir.), cert. denied, 377 U.S. 946.

The Government's response to the motion and affidavits argued that the cited evidence of alleged insanity was not newly discovered; that Allen knew he had been under psychiatric care and, in fact, had testified about his hospitalization and electroshock treatments at the trial; and that defendant's trial counsel had been questioned by the trial judge and replied that claims of insanity or incompetence were not to be relied on.

The trial court denied the motion for a new trial after consideration of the motion and affidavits, but without a hearing, on the ground that "the evidence should have been discovered prior to trial through the exercise of due diligence by Mr. Allen or his attorneys." (R. I, 165). The court's reasons were explained in some detail. The order said that as early as August 1974—four months before trial—the competency issue was raised by Allen's attorneys in a motion for a continuance which alleged that defendant was in a Minnesota clinic and unable physically or emotionally to attend a hearing. Counsel was requested to submit a report on defendant's condition and was asked if he wanted to arrange for a psychiatric evaluation of Allen. Counsel responded by filing a copy of a letter from Dr. Martin, dated September 6, 1974, stating that he had been treating Allen since April of 1970 and explaining his mental and physical condition.[8] The court concluded that "[e]ven assuming it is in the nature of Allen's illness to conceal its nature and severity, there is no contention that his attorneys or Dr.

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[8] Our record contains the pre-trial September 6, 1974, letter from Dr. Martin referred to in the court's order. The diagnosis then given was "Manic Depressive Reaction." The letter said that defendant has experienced both manic and depressive episodes, the depression being more "frequent and devastating;" that in depression Allen becomes withdrawn, experiences overwhelming emotional anxiety, and "is essentially not able to function in any meaningful capacity;" that if Allen is again depressed and if he had to appear in court, "he in no way could intellectually function in his own behalf. . ." (R. I, 181-82).

Martin labored under the same handicap." (R. I, 166-67). The court did not make an express finding or ruling on the alternative ground of ineffective counsel as alleged in defendant's motion.

The general requirements for a new trial in a criminal case are familiar. The newly discovered evidence must be more than impeaching or cumulative; it must be material to the issues involved: it must be such as would probably produce an acquittal; and a new trial is not warranted by evidence which, with reasonable diligence, could have been discovered and produced at trial. United States v. Leyba, 504 F.2d 441, 442-43 (10th Cir.), cert. denied, 420 U.S. 934. The motion is not regarded with favor and is granted only with great caution, being addressed to the sound discretion of the trial court. United States v. Perea, 458 F.2d 535, 536 (10th Cir.). The trial court held here that even assuming the first three grounds were satisfied, a new trial should not be granted "because the evidence should have been discovered prior to trial through the exercise of due dilligence by Mr. Allen or his attorneys." (R. I, 165). We find no abuse of discretion in the trial court's ruling. Any claim of lack of knowledge of the basic facts about the evidence by trial counsel is untenable and the attempt to transform the argument into one of ineffective counsel must be rejected.

It is true that a factual basis for a substantial insanity defense was developed in the post-trial affidavits of Dr. Martin and the psychologist. See notes 6-7, supra. However, as the court noted, several months before trial the issue of Allen's mental condition had been raised by a motion for a continuance supported by an earlier letter of Dr. Martin and a statement from a psychiatrist at the Minnesota clinic where defendant was being treated. While the diagnosis then was not nearly as serious as stated by the doctor's affidavit after trial, Dr. Martin's letter put before counsel the basic facts of Allen's hos-

pitalization and that, when depressed, Allen "is essentially not able to function in any meaningful capacity." (R. I, 181). Furthermore, Dr. Martin's post-trial affidavit stated that Mrs. Allen related efforts she made with counsel during the trial to have Allen's psychiatric history presented. (R. I, 146).

At trial evidence on Allen's mental condition was actually presented during direct examination of Allen by his counsel. Allen discussed his hospitalization when testifying about transactions covered by the indictment. (See, *e.g.*, R. XXVIII 1873, 1912-14). His counsel asked where he had been hospitalized and he said at the Ginny Seely Hospital in Galveston for about four months in 1970 and over into 1971. He also stated that he drew 50% disability from the Government for service-connected disability—". . . depression, I think is the simplest thing it's ever been called." He said further that he had received chemical treatment and electroshock therapy during the 1970-1971 hospitalization and that he had observed that the treatment had the effect of causing a complete loss of memory—"I mean, it obliterates some things completely"—but that things forgotten came back to him piecemeal. (Id. at 1913-14)[9]

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[9] In this connection, we note that defendant testified in detail about the conversations, trips and documents involved and that his testimony was generally thorough and direct and denied wrongdoing in the various transactions. Occasionally Allen said that he could not remember specifics, but the points involved were not of major importance. For example, he said that he could not recall (1) how many times he talked with or contacted Mr. Kegler, one of his customers; (2) whether there was a potash stipulation in the Sloan lease; (3) whether he visited one of his customers, Mr. George Johnson, in February or the summer of 1971; (4) the visit of Mr. Marshall, a postal inspector. (R. XXVIII, 1883; R. XXIX, 2030-31; R. XXX 2269, 2375-77).

Defendant has never claimed that he was not competent to stand trial. See note 2, supra. Thus we must treat him as having had sufficient ability at trial to consult with his lawyer with a reasonable degree of rational understanding and as having a ra-

Thus, when he ruled on the motion for a new trial the trial judge had before him proof of trial counsel's awareness of the essentials of Allen's mental history. The court had also heard trial counsel's statement at the first sentencing, several months before the ruling on the motion, that he did not realize the seriousness of the mental problem until he saw the doctor's report to the probation office and would have tried the case on an entirely different basis, had he known.[10] Weighing all the circumstances the trial court found that the due diligence requirement was not met, and we cannot say there was error in the ruling. United States v. Perea, supra, 458 F.2d at 536.

Appellate counsel have now expanded the argument and stress the claim of ineffective counsel, which may serve as the basis for a new trial. See United States v. DeCoster, 487 F.2d 1197, 1204-05 (D.C.Cir.); United States v. Brown, 476 F.2d 933, 935 (D.C.Cir.). While the trial court did not expressly rule on that alternative claim, it was implicitly rejected by the denial of the motion. Defendant says that this was error and that in any event the court should have held an evidentiary hearing on the motion and this claim in particular. We do not agree. The trial court carefully considered the affidavits and had before him the evidence of the lengthy trial, trial counsel's statement that he had not realized the seriousness of the mental problem until after the trial, and the contradictory proof from defendant's testimony and Dr. Martin's pretrial letter. On this record we cannot agree there was

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tional as well as factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 402; Wolcott v. United States, 407 F.2d 1149, 1150 (10th Cir.), cert. denied, 396 U.S. 879.

[10] We must say that this reflects the natural expectation of unsuccessful counsel that improvement could be made the second time around. Alire v. United States, 365 F.2d 278, 279 (10th Cir.), cert. denied, 386 U.S. 984.

error in not holding an evidentiary hearing to develop the facts further.[11]

It seems clear that despite the awareness by defendant and his counsel of the mental problem, it was simply not presented as a defense. To grant a new trial on a claim of ineffective counsel on this record would put a premium on neglect and would encourage a strategy of not making use of available information, with the thought that its later "discovery" might be the basis for a new trial if the verdict was adverse. Cf. United States v. Passero, 290 F.2d 238, 244 (2d Cir.), cert. denied, 368 U.S. 819; United States v. Vowteras, 500 F.2d 1210, 1212 (2d Cir.), cert. denied, 419 U.S. 1069. We feel that there was no error in the rejection of the claim of ineffective counsel.

II

The claims of prejudicial pre-indictment delay and alleged errors at the hearing thereon

Defendant moved to dismiss the indictment for violation of his constitutional rights to a fair trial and due process, "resulting in substantial prejudice to the defendants' defenses because of the delay of prosecution." (R. I, 25). After an evidentiary hearing was held as requested, the trial court entered an order stating its findings and denying the motion.

On appeal defendant argues that the ruling was error and urges these principal contentions: that the time lapse between the dates of Allen's alleged offenses and the indictment was unreasonable, being over three and four years except for counts IX and X; that the Government had knowledge of the facts comprising all but counts IX and X for over one year and seven months

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[11] In this connection we note that the motion for a new trial and the supporting brief made no request for such an evidentiary hearing.

before the indictment; that Allen suffered prejudice to his capacity to assert his right against self-incrimination in that he gave the Government access to material relating to his operations during this time; that he suffered prejudice due to his loss of memory following the electroshock treatments and the loss of other evidence attributable to the delay; and that the delay was motivated by the Government's design to gain a tactical advantage.

The trial court's order rejecting Allen's contentions is detailed. It addresses fully the contention that Allen was prejudiced because he gave information about his operations to the Government in connection with a civil suit in which both Government officials and Allen were sued by a Mr. Barton in an action challenging the mode of Central's operations under the applicable government regulations. The court emphasized that the issues in the civil and criminal cases were quite different [12] and that Allen was not asked for information by the Government but volunteered it himself.[13] The court also found that

[12] In this context, we note that the same judge presided over the civil and criminal trials.

[13] This portion of the court's order stated (R. I, 69-70):

> Several factors should be noted. In the first place, the civil suit involved relatively narrow issues concerning whether or not Department of Interior regulations governing the drawings for leases had been complied with, particularly in regard to the use of money orders in those drawings. This is a quite different matter than the allegations at stake in this indictment. Even more important, Allen was never asked for information about his operations—sometime in early 1972 he became aware that an investigation was going on and volunteered information about his operations. He further requested that the dealings surrounding certain other leases, not involved in the investigation at that time, be included in the investigation in the future. In August of 1972 he called Mr. Neff, one of the Inspectors conducting the investigation, and offered to give him more information on the operations of [Central]. Neff immediately advised him that the investigation underway was a criminal investigation, and that if Allen wished to discuss it, he should bring an attorney with him. Despite this warning, Allen continued to

Allen had been warned by one of the postal inspectors whom he called that a criminal investigation was in progress and that if Allen wished to discuss it he should bring his attorney. Allen then continued to send unsolicited information to the Government. The court also rejected the argument that the action of Allen's earlier counsel in the civil case in "stripping" his file during the interim had prejudiced Allen's ability to show what information he had himself furnished to the Government. The court pointed out that copies of correspondence and documents given to the Government had been furnished to Allen. We are satisfied that the record supports the court's findings on these points.

A further contention is made that a key witness, an engineer who had prepared maps of the Cable Ridge area, had died in the interim. However, this claim was not made in the trial court. Hence there was no record made as to the time of the witness's death or what his testimony would have been, essentials required to demonstrate prejudice. See United States v. Moore, 378 F.Supp. 990, 991 (E.D.Pa.). Defendant argues again that he was afflicted by amnesia and could not testify in his defense. As noted earlier, we are convinced the record does not support such a claim by defendant in view of his generally thorough testimony on the transactions. See note 9, supra.

A claim of denial of due process by pre-indictment delay must be supported by a showing of actual prejudice resulting from the delay and that the delay was purposefully designed to gain some tactical advantage

> send unsolicited information about his operations to the U.S. Attorney's office, even though he had been dismissed from the suit some months earlier. To dismiss the indictment because of Allen's actions would allow future investigations to be aborted by potential defendants by volunteering information and then claiming prejudice because of their own actions.

or to harass the defendant. United States v. MacClain, 501 F.2d 1006, 1010 (10th Cir.). Without going further into the elements of such a constitutional defense under the principles of United States v. Marion, 404 U.S. 307, we must sustain the trial court's conclusion on the ground that prejudice was not shown.

There is a related contention that the trial court erred in not requiring the United States Attorney to testify at the hearing on this issue under a subpoena duces tecum issued to him. At the hearing the prosecutor advised the court that he declined to testify since he did not have permission to testify under regulations governing testimony by Department of Justice personnel. The regulations prohibit a Department employee from disclosing information or producing material in Department files or disclosing information or producing material acquired as part of the performance of his official duties, without prior approval by the appropriate Department official or the Attorney General. 28 C.F.R. § 16.22 (1974). As a procedural predicate for such approval 28 C.F.R. § 16.23 (c) (1974) provided:

> If oral testimony is sought by the demand, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or his attorney, setting forth a summary of the testimony desired, must be furnished for submission by the U.S. attorney to the appropriate Department official.

Our record shows no effort by defendant to submit the affidavit or statement summarizing the testimony desired so that the Department could consider the request and determine whether to grant permission for the testimony. In view of this, we feel that defendant is in no position to claim error in the court's refusal to require testimony by the prosecutor. We feel that the regulation controlling such disclosures by Department of Justice employees is

valid. See United States ex rel. Touhy v. Ragen, 340 U.S. 462, 467-69; Boske v. Comingore, 177 U.S. 459, 469-70.

Defendant argues that at least since the decision in United States v. Nixon, 418 U.S. 683, such an official may be subpoenaed and required to produce relevant evidence. See also United States v. Andolschek, 142 F.2d 503, 506 (2d Cir.). We do not have the problem, however, of whether the court should have rejected a refusal by the Department due to the constitutional guarantees of the Fifth and Sixth Amendments. Since the defendant did not follow the procedure and submit the required summary of testimony desired, the Department made no decision whether the prosecutor could testify and we do not reach the constitutional claim.

Lastly, defendant argues that the trial court erred in not compelling production of material required by the subpoena duces tecum. The subpoena broadly called for all files and records in the prosecutor's office and the court modified it to require production only of all statements and materials which Allen had furnished the United States Attorney's office (which occurred during the Barton civil case challenging Central's operations) and all other exculpatory material. We see no error in this ruling.

The material ordered to be produced gave defendant all that the circumstances required. There was a further demand for materials to establish the information obtained by the Government showing probable cause for an indictment and when it was acquired. However there is no requirement that the Government bring charges as soon as probable cause may exist. See Hoffa v. United States, 385 U.S. 293, 309-310; United States v. Chadwick, 415 F.2d 167, 172 (10th Cir.). Thus there was no independent justification for inquiry on such an issue. The inquiry might have relevance as an element of the general issue of pre-indictment delay under *Marion* princi-

ples. But since there was no showing of prejudice to support such a claim, any error in not opening up this avenue of inquiry was harmless in any event.[14]

In sum, we feel there was no error in the denial of the motion to dismiss for pre-indictment delay or in the procedural rulings relating to this claim.

III

Sufficiency of the proof of the dates of Allen's receipt of the application cards

Defendant contends that the Government failed to prove that the alleged taking and receiving of the application cards involved in counts I through VIII occurred on any specific dates. He says that this lack of proof was fatal and that the convictions on those counts must be reversed.

The validity of this argument depends on the interpretation given to counts I through VIII. The critical paragraph of these counts reads as follows (R. I, 16-18):

> On or about [date], in the State and District of New Mexico, the defendants, THOMAS ALLEN and CENTRAL SOUTHWEST OIL CORPORATION, in executing the aforesaid scheme and artifice to defraud, did take from and receive, and cause to be taken and received from the mails a drawing application card signed by [the allegedly defrauded client] with an address of Post Office Box 2107, Roswell, New Mexico 88201.

The defendant argues that these allegations are meant to cover Central's receipt of the application cards mailed by the customer and that the Government's proof did not

[14] These and other reasons were suggested by trial counsel as a basis for interrogating the United States Attorney, but we feel them clearly insubstantial.

establish that the offenses occurred on the dates alleged. The Government contends [15] that the indictment refers to the receipt of the winning application cards, along with the oil and gas leases for the parcels, after they were mailed from the BLM back to Central and that its proof was sufficient to establish that the offenses occurred reasonably near the dates alleged. We must agree with the defendant's interpretation of the indictment for several reasons.

First, the indictment does not allege that the oil and gas lease was attached to and mailed with the application card received by Central, a surprising omission in view of the fact that the mailing of the lease to Central was an integral, if not the most important element, of the scheme involved in the first eight counts. Second, if the indictment had been intended to cover Central's receipt of the card after it was mailed back from the BLM, it would seem logical to expect that the indictment would have alleged a date nearer the actual time of mailing from the BLM, such as the date of the issuance of the oil and gas lease which occurred nearly contemporaneously with the second mailing. Instead, the dates alleged in the indictment are prior to the simultaneous drawings and bear no logical relationship to the second mailing.[16] Third, the first paragraph of counts I through VIII of the indictment, which details the scheme to defraud, uses the word "mail" only in connection with the first mailing

[15] The Government argues that under the concurrent sentence doctrine the issues relating solely to the first eight counts need not be considered if the judgment is to be affirmed as to the remaining counts. Without deciding whether these counts should be reviewed due to possible harm flowing from the multiple convictions, see Benton v. Maryland, 395 U.S. 784, 790-91; Andresen v. Maryland, 427 U.S. 463, 469 n.4, separate fines were imposed on each of the 20 counts and review of these counts is thus necessary.

[16] The dates alleged in the eight counts are the exact dates stamped on the face of the application cards. There was no proof as to when or by whom those dates were stamped on the cards.

—that when the signed application card was mailed by the customer to Central.[17] The indictment does not refer to any mailing from the BLM back to Central at all.[18] Accordingly, we agree with defendant that the indictment alleged a use of the mails involving the taking and receiving of the cards when first mailed from the customers to Central.[19] Our inquiry must now focus on whether there was sufficient proof of these acts.[20]

The essential elements of a mail fraud prosecution are (1) a scheme to defraud and (2) the use of the mails to execute or further this scheme. Pereira v. United States,

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[17] The indictment states (R. I, 15):

> . . . defendants solicited such persons to sign a drawing application card and *mail* it plus money . . . to defendant [Central] . . . (Emphasis added)

[18] The operation of the first scheme to defraud after a winning card had been drawn was described as follows, with no reference to any mailing from the BLM back to Central (R. I, 15):

> It was a part of said scheme and artifice to defraud that when persons who had a drawing application card placed in the Bureau of Land Management drawing by the said defendants won the drawing for a federal oil and gas lease, the defendants obtained an assignment of the federal oil and gas lease from the drawing winner.

[19] The Government argues that since Central's address was placed on the application cards after their receipt from the customers, the indictment's reference to receiving an addressed card can only refer to the second mailing. Though initially appealing, this argument fails because there is insufficient proof that it was Central's practice to address the application cards after, rather than before, the customer received, signed and returned them. No firm evidence as to Central's practice was elicited from Allen or the other Central employees who testified and the testimony of the individual customers on this point was sparse and contradictory. Compare R. XIX, 577; R. XX, 736-37 with R. XIX, 391; R. XX, 681-82.

[20] This use of the mail having been the one alleged in the grand jury's indictment, we must focus on the proof surrounding it. See United States v. Radetsky, 535 F.2d 556, 562 (10th Cir.), cert. denied, —— U.S. ——.

347 U.S. 1, 8. Time is not an essential element of proof in a mail fraud offense. Jacobs v. United States, 395 F.2d 469, 474 (8th Cir.). Ordinarily the proof of the acts charged on any date within the statute of limitations and before the return of the indictment is sufficient. Ledbetter v. United States, 170 U.S. 606, 612; United States v. Davis, 436 F.2d 679, 682 (10th Cir.); United States v. Somers, 496 F.2d 723, 745 (3d Cir.), cert. denied, 419 U.S. 832.

An examination of the record reveals a lack of sufficient proof as to five counts. It was not established that the acts alleged in counts I, II, III, V and VII occurred within the five year statute of limitations period (see 18 U.S.C.A. § 3282), which extends only back to August 3, 1969. All of the customers named in counts I through VIII sent more than one card to Central on more than one occasion. Thus, it is impossible to determine when the winning cards were mailed or received. See R. XXIV, 1369-70. The only way to be sure that none of the convictions rests on a use of the mails not within the statute of limitations is to infer that the winning card was included in the victim's first mailing to Central. Under this approach, the record shows that only the customers named in counts IV, VI and VIII of the indictment began to use Central's service on or after August 3, 1969.[21] Accordingly, the convictions with respect to counts I, II, III, V and VII must be reversed since those offenses may be beyond the limitations period.

It remains to be determined whether the convictions on the remaining counts can stand. The problem is whether there is such remoteness and uncertainty of the dates proven as to the taking and receiving from the mail so as to constitute a fatal variance.[22] We recognize

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[21] See R. XIX, 389, 533; R. XVIII, 290.

[22] The defendant does not dispute the Government's proof that the customers mailed in the cards to Central. See Defendant-Appellant's Brief in Chief, 53.

that the periods within which the offenses could have occurred under the proof made were of considerable length —approximately 8, 14 and 8 months for counts IV, VI and VIII, respectively. However, we feel the crucial test is whether the variance from the dates alleged was prejudicial. United States v. Harmon, 486 F.2d 363, 366 (10th Cir.), cert. denied, 415 U.S. 979; United States v. Somers, supra, 496 F.2d at 745 & n.41.[23]

The inquiry as to prejudice focuses on (1) the effect of the variance on the defendant's ability to prepare his defense and (2) the danger that the defendant might be prosecuted a second time for the same offense. Berger v. United States, 295 U.S. 78, 82; United States v. Harmon, supra, 486 F.2d at 366. Allen does not now contend that he was surprised or that the preparation of his defense was hampered, nor does it appear from the record that such was the case. See United States v. Joyner, 539 F.2d 1162, 1164-65 (8th Cir.). Furthermore, there was no motion for a bill of particulars. United States v. Antonelli, 439 F.2d 1068, 1070 (1st Cir.). Hence we see no prejudice from surprise.

The double jeopardy argument is, however, vigorously pressed. Defendant says that since any card mailed by a customer in prior months might have been the winning card, the Government could prove that a card was mailed to Allen and actually received by him on a date other than that alleged in the indictment, even though the card mailed was in fact the same card whose receipt was the

[23] We are mindful of the familiar instruction, given here, that the proof is sufficient if it establishes beyond a reasonable doubt that the offense occurred on a date reasonably near the date alleged in the indictment. See Tafoya v. United States, 386 F.2d 537, 539 (10th Cir.), cert. denied, 390 U.S. 1034. However, we are satisfied that no prejudice by variance from the dates alleged is shown in this case and the general requirement of being within the limitation period is met on these three counts. Hence as to these counts we feel that no further challenge based on the dates involved should be heard.

basis for his conviction in this case. In the absence of proof that the cards were in fact received by Allen on the dates indicated thereon, Allen argues he can be reprosecuted for receiving those same application cards at a prior time. Defendant-Appellant's Brief in Chief, 55-56.

We must disagree. Allen bases his double jeopardy argument on the fact that each separate mailing constitutes a separate offense. However, on these facts there could be only one receipt by defendant of the card which was mailed by the customer and which was eventually drawn by the BLM as a winner. The entire record and exhibits, including the cards, may be used to defend against a second prosecution.[24] See Russell v. United States, 369 U.S. 749, 764; United States v. Henry, 504 F.2d 1335, 1338 (10th Cir.), cert. denied, 421 U.S. 932. We are convinced there is no practical danger of any reprosecution on counts IV, VI and VIII and the convictions thereon should not be set aside.

In sum, in connection with the first scheme the convictions on counts I, II, III, V and VII must be set aside; the proof on counts IV, VI and VIII is sufficient.

IV

The "fiduciary duty" issues and alleged trial errors relating to it

Defendant maintains there were several errors related to the failure of the Government to prove that a fiduciary duty existed between defendant and his customers. He

[24] The application cards were offered as exhibits. They were tied in with the leases (also made exhibits) from the BLM which were won by the customers on the cards. Thus the transaction to which each card was related was clearly identified in the record and we perceive no danger of uncertainty that might lead to reprosecution for receipt of the same cards which are in our record.

argues that the Government failed to prove the existence of such a duty; that, in particular, counts I through VIII alleged only fraudulent non-disclosures, *i.e.*, that Allen fraudulently failed to disclose to the customers that they had won valuable leases; that without a fiduciary duty, Allen had no obligation to make such disclosures; and thus no violation of the mail fraud statute was shown.

We must disagree. While the existence of a fiduciary duty is relevant and an ingredient in some mail fraud prosecutions, *e.g.*, United States v. Keane, 522 F.2d 534, 545 (7th Cir.), cert. denied, 424 U.S. 976; United States v. Isaacs, 493 F.2d 1129, 1145-50 (7th Cir.), cert. denied, 417 U.S. 976; United States v. George, 477 F.2d 508 (7th Cir.), cert. denied, 414 U.S. 827; Shushan v. United States, 117 F.2d 110 (5th Cir.), cert. denied, 313 U.S. 574, it is not an essential in all such cases.[25] We are convinced that mail fraud prosecution is proper in these circumstances, without proof of any fiduciary duty. See, *e.g.*, Williams v. United States, 368 F.2d 972 (10th Cir.), cert. denied, 386 U.S. 997; Gusow v. United States, 347 F.2d 755 (10th Cir.), cert. denied, 382 U.S. 906.

Further, fraudulent representations, as the term is used in 18 U.S.C.A. § 1341, may be effected by deceitful statements of half-truths or the concealment of material

[25] Defendant relies on the *George*, *Keane*, and *Shushan* cases. They merely demonstrate that breach of a fiduciary duty is one type of conduct that comes within the ambit of the mail fraud statute, especially in the context of public officials (*Keane*, *Isaacs* and *Shushan*) and corporate executives (*George*).

Defendant also cites Clinkenbeard v. Central Southwest Oil Corp., 526 F.2d 649 (5th Cir.), a customer's suit for rescission of a lease assigned to Central. The district court had entered a judgment for rescission based on Central's violation of an agent's fiduciary duty to disclose material facts. The Fifth Circuit reversed, holding that under Texas law the agency relationship of Central to the plaintiff and Central's fiduciary duty terminated when the plaintiff was notified that he had won a lease. We do not agree that these principles are controlling in this federal mail fraud case.

facts and the devising of a scheme for obtaining money or property by such statements or concealments is within the prohibition of the statute. *Williams*, supra at 975; *Gusow*, supra at 756; Lustiger v. United States, 386 F. 2d 132, 138 (9th Cir.), cert. denied, 390 U.S. 951. Here there were statements concerning the transactions in counts IV, VI and VIII which, taken with the failure to disclose the fact that valuable leases were involved, amounted to sufficient proof of fraudulent representations under the statute.[26]

[26] As to counts IV, VI and VIII the record tended to show the following:

Count IV (Ferris): that Allen told him he had been a fairly consistent investor and that Central wanted to show its appreciation by giving him $1,000; that he, Ferris, thought the lease assignment he signed was a receipt; and that Allen didn't say anything about him having won a lease. (R. XIX, 534, 535, 544). Allen paid Ferris $1,000 for the lease and agreed to sell it within two weeks for $19,502. Ferris retained a 1% override and Allen retained a 4% override.

Count VI (Marcrum): that Allen said seven people had filed on the lease (when in fact 471 had filed); that as to price for the lease, Allen told him what they were going to pay, and "I just didn't know the real value." (R. XVIII, 299, 301; R. XXIII, 1141). Allen paid Marcrum $3,600 for the lease and agreed to sell it within about one week for $20,000. Marcrum retained a 1% override and Allen retained a 3% override.

Count VIII (Dymersky): that Allen said the land was "pretty well worthless" and was wanted only for access to other valuable lands; and that he, Dymersky, had to sign some papers and Allen would give him $500. (R. XIX, 393-94, 399-400, 406, 452). In August, 1970, Allen paid Dymersky $500 for the lease and agreed to sell it within two months for $34,400. After some controversy the lease was ultimately sold to a third party in April, 1973, for $25,800. Dymersky retained no override while Allen retained a 5% override on the 1973 sale.

We are concerned now only with counts IV, VI and VIII. All the remaining counts of the first scheme (*i.e.*, to obtain the assignment of valuable leases to Central from winning customers) are to be reversed for insufficiency of proof in other respects, as discussed earlier. Further, as to all the counts in the other two schemes (to obtain overriding royalties retained by customers and to sell "royalty deeds" from the Cable Ridge area), affirmative misrepresentations were alleged and proven.

The remaining points related to this issue are also untenable. The instruction ruling out consideration of whether a fiduciary duty existed was not error here, although the issue could be germane and thus require a different instruction in other circumstances.

V

The claim of error in refusing to allow examination of Inspector Marshall's report

Defendant argues that the trial court erred in denying his counsel the right to examine a report of Postal Inspector Marshall which allegedly contained exculpatory material and statements by Allen to the inspector. He contends that by conducting only an *in camera* examination of the report instead of permitting defendant to examine it, the court violated his constitutional rights, citing Alderman v. United States, 394 U.S. 165.

Alderman dealt with the question whether evidence used at trial was tainted by a prior illegal wiretap—a problem which trial counsel might better assess in light of all of the relevant circumstances. Where, as here, the inquiry is whether certain material might be exculpatory, we feel that an *in camera* examination by the court is constitutionally permissible. United States v. Ross, 511 F.2d 757, 765 (5th Cir.), cert. denied, 423 U.S. 836; see *e.g.*, United States v. Gleeson, 411 F.2d 1091, 1094 (10th Cir.).

The trial court examined the material *in camera* [27] and found that (R. XXIII, 1071):

> It has absolutely nothing to do with this particular lawsuit. It didn't cover the same area of time or

[27] Actually there are both a preliminary and concluding report in our record. They were both sealed in an envelope bearing the statement that it was opened by the trial judge during trial, and the judge's initials.

> anything else. It has no business being here and this was the inspector's opinion. The matter was not submitted to the U. S. Attorney. It wasn't submitted to a Grand Jury or anything else. It was one man's opinion.

We have examined the reports and see nothing there material to the defense, nor any exculpatory material discoverable under Brady v. Maryland, 373 U.S. 83. We find no error in the court's ruling or procedure.

Accordingly, for the reasons stated the convictions on counts I, II, III, V and VII must be reversed for insufficiency of proof and as to them the cause is remanded for dismissal of the charges. As to the remaining counts, the judgment is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 74-230 Criminal

[Filed July 8, 1975]

UNITED STATES OF AMERICA,
Plaintiff,
vs.
THOMAS ALLEN
and
CENTRAL SOUTHWEST OIL CORPORATION,
Defendants.

ORDER

This matter comes up at this time on the motion of defendant Allen for a new trial. The ground for this motion is the familiar one of newly discovered evidence, but with a somewhat unusual twist. Briefly, counsel for Allen, who did not participate in the trial, states that Allen has a long history of severe mental illness, variously diagnosed as manic-depressive and/or schizophrenic reaction, paranoid type, for which he has been hospitalized and treated at various times over the past twenty years. The treatments have included at least one course of shock therapy. In support of this motion, counsel has submitted affidavits from two psychiatrists concerning Allen's mental condition.

To obtain a new trial on the basis of newly discovered evidence, the defendant must show: 1) that the evidence is relevant to the issues of the case; 2) that it is not merely cumulative or impeaching; 3) that it would have a significant effect on the outcome of the case, probably resulting in an acquittal; 4) that the evidence was not

discoverable prior to trial through the exercise of due diligence. *Berry* v. *State*, 10 Ga. 511 (1851); *United States* v. *Johnson*, 307 U.S. 106, 90 L.Ed. 562 (1946); *United States* v. *Leyba*, 504 F.2d 441 (10th Cir. 1974), cert. den. — —U.S. —— (1975); *United States* v. *Perea*, 458 F.2d 535 (10th Cir. 1972).

Counsel for Allen argues his situation satisfies the first three parts of this test because: the crime for which Allen was convicted—mail fraud, 18 U.S.C. 1341—is a specific intent crime; that Allen's mental condition, as attested to by the affidavit of Winston L. Martin, M.D., Associate Professor, Department of Psychiatry, University of Texas Medical Branch, Galveston, Texas, was such that he was incapable of forming the requisite specific intent to defraud; and that if evidence of his mental condition at the time of the acts charged presented to a jury or to a court sitting without a jury, Allen would probably be acquitted on the basis of his mental condition. Assuming without deciding that counsel is correct, and the first three parts of the test are satisfied, I find that a new trial should not be granted because the evidence should have been discovered prior to trial through the exercise of due diligence by Mr. Allen or his attorneys.

Counsel's argument as to the requirement of due diligence can be summarized as follows: that the nature of Allen's mental illness is such that, as part of the disease, Allen refuses to admit that he has a severe mental illness and/or that it has any marked effect on him, and that in line with the nature of his disease, he concealed its existence and severity from his attorneys. While there is no case directly on point, counsel notes that in *Nagell* v. *United States*, 354 F.2d 441 (5th Cir. 1966), the Court of Appeals for the Fifth Circuit held that where a defendant with a serious mental illness concealed significant facts in his medical history from his attorney, and

the other requirements for a new trial on the basis of newly discovered evidence were satisfied, a new trial should be granted. In so holding, the Court noted:

> . . . the proof is really without substantial dispute that appellant was suffering from a mental disorder which caused, if not compelled, him to follow this course. He is thus no more to be bound by it in a serious matter of this kind than in any other situation involving mental derangement. 354 F.2d 441, 449 (5th Cir. 1966).

Counsel's argument founders on the facts of this case. As early as August, 1974, four months before trial, the issue of Allen's mental condition was raised by his attorneys in a motion for continuance of a hearing scheduled that month, in which they stated that Allen was in Hazelden Clinic in Minnesota, and physically and emotionally unable to attend a hearing at that time. In response to this, on August 27, 1974, counsel for Allen was requested to submit a report on Allen's physical and mental condition and asked if he wanted to arrange for a psychiatric evaluation of Allen. In response to this, counsel filed a xerox copy of a letter to him from Winston L. Martin, M.D., dated September 6, 1974, in which Dr. Martin told counsel that he had been treating Allen for his mental condition off and on since April of 1970, and explaining his mental and physical condition in some detail. This is the same Dr. Martin whose affidavit concerning Allen's mental condition provides the psychiatric basis for the motion for a new trial. Even assuming it is in the nature of Allen's illness to attempt to conceal its nature and severity, there is no contention that his attorneys or Dr. Martin labored under the same handicap. In such a situation the requirement of due diligence can hardly be said to be satisfied.

For the reasons above given; Now, Therefore,

IT IS ORDERED that the motion of defendant Thomas Allen for a new trial in the above entitled matter be, and the same hereby is, denied.

/s/ Edwin L. Mechem
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARCH TERM—April 26, 1977

No. 75-1873

D.C. No. CR-74-230

Before The Honorable William J. Holloway, Jr.,
The Honorable Robert H. McWilliams, and
The Honorable James E. Barrett, Circuit Judges

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THOMAS ALLEN,
Defendant-Appellant.

This cause came on to be heard on the record on appeal from the United States District Court for the District of New Mexico, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is reversed, in part, as to the convictions on counts I, II, III, V and VII. The judgment of that court is affirmed as to the remaining counts: IV, VI, VIII, IX, X, and counts XI-XX, inclusive. It is the further order of this court that Thomas Allen, appellant, shall, within ten (10) days from and after the date of the filing of the mandate of this court in the district court, surrender himself to the custody of the United States Marshal for the District of New Mexico in execution of the judgment and sentence imposed upon him.

The District Court may, in its discretion, permit the appellant to surrender directly to the designated Bureau of Prisons institution for service of sentence.

The cause is remanded to the United States District Court for the District of New Mexico for dismissal of the charges in counts I, II, III, V and VII, and for further proceedings in accord with the opinion of this Court.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

I, Howard K. Phillips, certify that the foregoing is a copy of the judgment of this Court entered April 26, 1977 in cause No. 75-1873 pending in this Court.

I further certify that this judgment is not final and will not become final until it is made a part of the mandate of the Court pursuant to Rule 41, Federal Rules of Appellate Procedure. At the present moment, the mandate is expected to issue May 18, 1977, and to contain a copy of this judgment. The Court could order the judgment reworded wholly or in part prior to that date.

Certified at Denver, Colorado, this 10th day of May, 1977.

Witness my hand and seal of office:

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX D

CHRONOLOGICAL RELATIONSHIP BETWEEN CRIMES CHARGED AND PETITIONER'S HOSPITALIZATION

Count	Date of Use of Mails	Date of Alleged Perpetration of Frauds In Schemes One and Two	Relevant Hospitalization
First Scheme (Counts I through VIII)		Alleged in Indictment to have been devised on 4/24/70	April 1 - May 23, 1970
I (Johnson, Ruth S.)	June 25, 1971	7/14/71—Allen visits Johnsons re lease assignment	April 2 - June 1, 1971
II (Kail)	November 20, 1970	12/4/70—Telephone call between Allen and Kail; 12/7, 8 or 9—Telephone calls from Allen to Kail to negotiate assignment.	Aug. 30 - Dec. 16, 1970
III (Kegler)	January 22, 1971	2/4/71—Telephone call between Allen and Kegler; Middle of March—lease assignment. 4/16/71—Allen offers to purchase overriding royalty.	April 2 - June 1, 1971
IV (Ferris)	May 21, 1971	6/2/71—Telephone call between Allen and Ferris; 6/5/71—Allen makes his way to Ferris' home to negotiate assignment.	April 2 - June 1, 1971
V (Swaim)	April 24, 1970	5/7/70—Telephone call between Allen and Swaim; 5/8/70 or 5/9—Allen goes to Swaim's home to negotiate assignment.	April 1 - May 23, 1970
VI (Marcrum)	March 23, 1972	4/7/72—Telephone call between Allen and Marcrum; 4/9/72 (approx) Allen travels to Marcrum's home to negotiate assignment.	April 2 - June 1, 1971
VII (Sloan)	August 21, 1970	9/3/70—Telephone call between Sloan and Allen; 9/6/70—Allen visits Sloans' home to negotiate assignment.	August 30 - Dec. 16, 1970
VIII (Dymersky)	July 24, 1970	8/6/70—Allen calls Dymersky; 8/11/70—Allen travels to Connecticut to negotiate assignment.	Aug. 30 - Dec. 16, 1970
IX (Brown)	May 2, 1973	4/5/71 to 9/16/72—Allen conceals fact that Brown has won lease; May 1973—Allen purchases overriding royalty.	April 2 - June 1, 1971 Allen grossly psychotic
X (Johnson, Kenneth)	May 3, 1973	5/4/71—Allen receives assignment from Johnson; May 1973—Allen purchases overriding royalty.	April 2 - June 1, 1971 Allen grossly psychotic

CHRONOLOGICAL RELATIONSHIP BETWEEN CRIMES CHARGED AND PETITIONER'S HOSPITALIZATON—Continued

Count	Date of Alleged Use of Mails	Mailings and Hospitalization Relating to Scheme Three
XI	June 11, 1970	19 days after Allen's discharge from hospital on May 23, 1970.
XII	July 16, 1970	Between Allen's discharge from hospital on May 23, 1970 and his reentry on Aug. 30, 1970.
XIII	July 17, 1970	Same
XIV	August 5, 1970	25 days prior to hospitalization on August 30, 1970.
XV	August 7, 1970	23 days prior to hospitalization on August 30, 1970.
XVI	August 14, 1970	16 days prior to hospitalization on August 30, 1970.
XVII	September 22, 1970	During Aug. 30 - Dec. 16, 1970 confinement.
XVIII	November 3, 1970	During Aug. 30 - Dec. 16, 1970 confinement.
XIX	January 29, 1971	Shortly after Allen's release on Dec. 16, 1970 and before his reentry on April 2, 1971.
XX	February 5, 1971	Shortly after Allen's release on Dec. 16, 1970 and before his reentry on April 2, 1971.

Supreme Court, U. S.
FILED
AUG 25 1977
MICHAEL RODAK, JR., CLERK

No. 76-1851

In the Supreme Court of the United States

OCTOBER TERM, 1977

THOMAS ALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BENJAMIN R. CIVILETTI,
Assistant Attorney General,

SIDNEY M. GLAZER,
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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1851

THOMAS ALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 554 F. 2d 398. The order of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 1977 (Pet. App. C). On May 12, 1977, Mr. Justice White extended the time within which to file a petition for a writ of certiorari to June 25, 1977, and the petition was filed on June 24, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, convicted of committing a complex mail fraud, was deprived of effective assistance of counsel because his retained attorneys, who were aware of petitioner's mental problems, chose to rely on other defenses inconsistent with an insanity defense.

2. Whether, in the circumstances of this case, the government was required to prove that petitioner had a fiduciary relationship with the victims of his mail fraud scheme.

STATEMENT

Following a jury trial in the United States District Court for the District of New Mexico, petitioner was convicted on 20 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to two years' imprisonment and fined $1,000 on each count, the sentences to run concurrently. On appeal, the court of appeals reversed the convictions on five counts (counts I, II, III, V, and VII) because the evidence was insufficient to prove that the alleged offenses occurred within the five-year statute of limitations, but it affirmed the convictions on the other counts (Pet. App. 1a-25a).

The evidence at trial is set forth in the opinion of the court of appeals (Pet. App. 2a-3a). Briefly, it showed that, as president of the Central Southwest Oil Corporation, petitioner directed a nationwide mail fraud scheme that essentially involved persuading customers to enter the government's monthly "lottery" for the leasing of oil and gas rights and, if the customer won, fraudulently inducing him to assign the lease to Central at a price far

below market value (counts I-VIII).[1] Petitioner then reassigned the lease, often to a large oil company, at a substantial profit (Pet. App. 2a-3a, 23a, n. 26). The remaining counts involved the fraudulent sale of royalty deeds in supposedly valuable oil lands (*id.* at 3a).[2]

ARGUMENT

1. Petitioner contends (Pet. 10-15) that he was deprived of his Sixth Amendment right to the effective assistance of counsel because his trial attorneys—retained counsel who were experienced in the defense of mail fraud prosecutions—did not discover and present an insanity defense. The court of appeals correctly rejected this claim.

The record clearly reflects that petitioner's attorneys were aware prior to and during trial that petitioner had been treated for mental illness at approximately the same time as he was conducting his mail fraud operation (Pet. App. 7a-9a). In support of a motion for a continuance filed in September 1974, four months before trial, petitioner's counsel presented a letter from a psychiatrist who had diagnosed petitioner's illness as "Manic Depressive Reaction" (*id.* at 7a, n. 8). The letter also said that petitioner "has experienced both manic and depressive episodes, the depression being more 'frequent and devastating;' that in depression [petitioner] becomes withdrawn, experiences overwhelming emotional anxiety, and 'is essentially not able to function in any meaningful capacity;' [and] that if [petitioner] is again depressed

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[1]Counts IX and X involved a similar scheme in which petitioner fraudulently purchased overriding royalties from customers who had been successful in the lottery.

[2]A more detailed statement of the proof at trial on each of these counts is contained in pp. 2-16 of the government's brief in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

and if he had to appear in court, 'he in no way could intellectually function in his own behalf . . .'" (*ibid.*). Moreover, petitioner himself testified at trial about his mental illness and hospitalization, saying that he had received chemical treatment and electroshock therapy during the period of the alleged offenses and that the treatment had caused him to forget some of the details of the leasing operation (*id.* at 9a).[3]

Although a post-trial medical report further indicated that an insanity defense could have been developed at trial, both courts below correctly determined that petitioner's attorneys had ample knowledge prior to trial of petitioner's mental problems. Accordingly, they properly denied petitioner's motion for a new trial on the grounds of "newly discovered" evidence of insanity, because trial counsel had not met the requirement of due diligence (Pet. App. 10a, 26a-28a). See, *e.g.*, *United States* v. *Stofsky*, 527 F. 2d 237, 244-245 (C.A. 2), certiorari denied *sub nom.* *Hoff* v. *United States*, 429 U.S. 819; *United States* v. *Anderson*, 509 F. 2d 312, 327, n. 105 (C.A. D.C.), certiorari denied, 420 U.S. 991.

Nor do these facts demonstrate that petitioner received constitutionally ineffective assistance of counsel. As the court of appeals observed in rejecting petitioner's "attempt to transform the argument [for a new trial] into one of ineffective counsel" (Pet. App. 8a):

> It seems clear that despite the awareness by [petitioner] and his counsel of the mental problem, it was simply not presented as a defense. To

[3]The court of appeals noted: "Occasionally [petitioner] said that he could not remember specifics, but the points involved were not of major importance" (Pet. App. 9a, n. 9).

> grant a new trial on a claim of ineffective counsel on this record would put a premium on neglect and would encourage a strategy of not making use of available information, with the thought that its later "discovery" might be the basis for a new trial if the verdict was adverse [*id.* at 11a].

Contrary to petitioner's assertions (Pet. 10-15), the court's language suggests not that it was applying a new, more stringent standard for the testing of effective assistance of counsel claims, but rather that it was legitimately concerned that defense lawyers might deliberately avoid presenting a defense at trial in the hope that the omission might be raised, if necessary, in a motion for a new trial or on appeal. Cf. *Wainwright* v. *Sykes*, No. 75-1578, decided June 23, 1977, slip op. 16-17. The standard in the Tenth Circuit for determining whether a defendant has received the effective assistance of counsel continues to be the traditional "farce and mockery" test, as decisions rendered by the court of appeals both before and after this case indicate. See, *e.g.*, *Hayes* v. *United States*, C.A. 10, No. 76-2036, decided May 25, 1977, pending on petition for a writ of certiorari, No. 76-6959; *Gillihan* v. *Rodriguez*, 551 F. 2d 1182, 1187 (C.A. 10); *United States* v. *Dingle*, 546 F. 2d 1378, 1385 (C.A. 10). Whether one applies this standard or the "reasonableness" test followed in some circuits (see Pet. 11), the trial record here convincingly demonstrates that the performance of petitioner's counsel was well "within the range of competence demanded of attorneys in criminal cases" (*McMann* v. *Richardson*, 397 U.S. 759, 771). Hence, this case presents no occasion for the resolution of whatever differences may exist among the courts of appeals on this issue. See *Dunker* v. *Vinzant*, 505 F. 2d 503 (C.A. 1), certiorari denied, 421 U.S. 1003.

Much of the testimony during petitioner's three-week trial was necessarily devoted to explaining petitioner's sophisticated operation for defrauding victims of valuable oil leases and reassigning the leases to oil companies at immense profits to himself.[4] The success of petitioner's business required detailed knowledge of the interests and methods of the major oil companies, evaluation of scientific data to determine the oil potential of particular tracts, and a complete understanding of the esoterics of retained overriding royalty interests. In light of this proof, it is not surprising that petitioner's counsel rejected the idea of relying on a defense of insanity and instead chose to argue that petitioner's transactions with his customers had occurred at arm's length, that petitioner was not required to disclose facts alleged by the government to be material to the sales, and that there had been no scheme to defraud (Pet. 4).[5] Petitioner consistently

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[4]The evidence of fraud and misrepresentation on some of the counts is summarized by the court of appeals at Pet. App. 23a, n. 26.

[5]Substantial evidence indicated that petitioner fully appreciated the wrongfulness of his conduct. For example, after learning that his activities were being investigated, petitioner induced a geologist to prepare and backdate a misleading geological report on the oil potential of certain land which petitioner had fraudulently sold as valuable oil property (Vol. XXIV, Tr. 1310-1319). He threatened an employee to prevent her from giving information to the government (Vol. XXIV, Tr. 1358-1362) and destroyed records of his conversations with clients (Vol. XXIV, Tr. 1363-1364). Moreover, the psychiatrist's post-trial affidavit noted that petitioner had been suffering from mental illness since late 1968 (Pet. App. 6a). Although all of the illegal transactions alleged in the indictment occurred after 1968, petitioner testified that he had been operating his leasing service in the same manner (*i.e.*, by attempting to buy back leases from successful customers) since 1963 and that his business methods had been investigated and approved by the government (Vol. XVI, Tr. 100, 102). Thus, petitioner could not have claimed consistently both that he was operating "business as usual" during the time period of the

maintained at trial that his business tactics were completely legal and no different from the practices of any successful businessman (see, *e.g.*, Vol. XXXI, Tr. 2477-2479, 2486-2488, 2501-2502, 2505-2506); indeed, as the court of appeals noted (Pet. App. 9a, n. 9), petitioner himself "testified in detail about the conversations, trips and documents involved and * * * his testimony was generally thorough and direct and denied wrongdoing in the various transactions."

In sum, petitioner's counsel were well aware during their pre-trial preparation that petitioner had a possible insanity defense available to him, yet they reasonably determined to present an alternative defense inconsistent with insanity[6]– the claim that petitioner gave his customers a fair deal, which they were eager to accept and which often resulted in their receiving a profit many times their original investment (see, *e.g.*, Vol. XXXI, Tr. 2486-2487, 2490, 2493-2495)—which found some support in the record, which squared far more closely than did a claim of insanity with the government's strong proof that petitioner had knowingly committed the numerous acts charged as fraudulent, and (perhaps most significantly) which was more in keeping with petitioner's obvious desire not to jeopardize his reputation as a trustworthy businessman. Although in retrospect an insanity defense

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allegedly fraudulent transactions and that the fraudulent transactions were the product of his mental condition.

[6]An insanity defense usually presumes that the defendant committed all the elements of the offense charged but lacked the requisite intent. Cf. *Kaufman* v. *United States*, 394 U.S. 217, 229-230. Here petitioner steadfastly refused to admit any wrongdoing or misrepresentation in his transactions.

might have proven more successful, trial counsel's responsible tactical decision to rely on the "good business" approach did not deprive petitioner of constitutionally adequate representation. Cf. *Wainwright* v. *Sykes*, *supra*, slip op. 18, n. 14; *Estelle* v. *Williams*, 425 U.S. 501, 512.[7]

2. Petitioner also objects (Pet. 15-19) to the district court's instruction to the jury that the government was not required to prove, as an element of the crime of mail fraud, that a fiduciary relationship existed between petitioner and his customers. Petitioner did not object to this instruction when it was given (Pet. 4) and, as this Court has recently remarked, "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson* v. *Kibbe*, No. 75-1906, decided May 16, 1977, slip op. 8. In any event, as the court of appeals properly found (Pet. App. 22a-23a), "fraudulent representations, as the term is used in 18 U.S.C.A. § 1341, may be effected by deceitful statements of half-truths or the concealment of material facts and the devising of a scheme for obtaining money or property by such statements or concealments is within the prohibition of the statute." Although petitioner claims that the alleged non-disclosures in counts I-VIII could not have been fraudulent in the absence of a fiduciary relationship, the court below correctly observed that there was sufficient

[7]Although petitioner relies heavily on his counsel's post-trial statement that he would have presented an insanity defense if he had been more fully informed of the seriousness of petitioner's mental illness (Pet. 4-5), the lower courts could properly discount this admission, which "merely reflects the natural subjective expectation of an unsuccessful advocate that improvement can be made the second time around" (*Alire* v. *United States*, 365 F. 2d 278, 279 (C.A. 10)), and which was made prior to petitioner's sentencing in an obvious appeal for leniency.

proof of affirmative misrepresentations to support petitioner's convictions on counts IV, VI, and VIII—the only counts involving alleged fraudulent non-disclosures that were affirmed on appeal—regardless of the existence of a fiduciary duty (*id.* at 23a, n. 26).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

We show below that the Government's opposition to the first question presented by petitioner is unwarranted, and its opposition to the second question is completely unresponsive.

I. FIRST QUESTION.

A. The Government asserts that Allen's defense before the jury was inconsistent with a plea of diminished capacity or insanity and then infers that because trial counsel chose to defend on the merits, he also "chose" to

"reject" the available defense of diminished capacity and insanity (Opp. 2, 6, 8). Both the assertion and the inference therefrom are unwarranted.[1]

Allen did not plead alibi or otherwise deny the existence of the transactions alleged in the indictment. He contended that the transactions were made by him in good faith and at arms length, that he was under no obligation to disclose to his customers facts that the Government contended were material, and that there was no "scheme" to defraud. (Pet. 4 & n.13.) Evidence showing that Allen was hospitalized and undergoing electroshock treatments at the times that these transactions occurred and that his mental capacity was diminished would have tended to confirm that Allen was acting in good faith and was not implementing a scheme to defraud. Thus, the diminished capacity or insanity defense, if properly investigated and raised, would have bolstered, rather than undercut Allen's denial of a scheme to defraud and his defense of good faith. In addition, it would have provided an independent and admittedly substantial defense (Pet. App. 8a).

Having erected a hypothetical inconsistency between available defenses, the Government infers not only that trial counsel "chose" to defend on the merits, but also "chose" in some responsible way to "reject" the available defenses of diminished capacity and insanity (Opp. 6, 8). The Government, however, offers no record citation to support its assertion that defense counsel reasonably investigated and then weighed the supposedly inconsistent defenses,[2] defense counsel's statements are inconsistent

[1] The Government has lodged with the Clerk a copy of the brief it filed in the Tenth Circuit. In like vein, we are lodging the briefs filed by Allen in the Tenth Circuit. We note that Allen's reply brief in the court below takes issue with many assertions of fact and inferences made by the Government in its brief in the court below.

[2] The record shows that approximately four months before trial, the trial court admonished trial counsel to report on Allen's competency to stand trial—an issue obliquely raised by defense counsel's motion to continue the date for a hearing because Allen was physically and mentally unable to attend a hearing (Pet. 7 n.4). The trial court noted that "I've had a little trouble up to this point in getting the attention of the defense" (*id.*). On or after September 6, 1974, defense counsel obtained a letter from Allen's doctor relating to Allen's competency (Pet. 8 n.5). The letter mentions that Allen was hospitalized twice in 1970 and once in 1971, but does not indicate the length of these confinements or the nature of the treatment (Pet. 9 n.8). Shortly thereafter, Allen's counsel underwent surgery and was incapacitated from October 11, 1974, to January 1, 1975 (Pet. 8 n.6). Five days thereafter Allen's lengthy trial began (Pet. 4). The diminished capacity and insanity defenses were not raised. After trial, Allen's counsel stated that "I had not realized until I saw the report of the doctor [submitted by the Probation Office in conjunction with sentencing] the seriousness of this matter and what the situation actually was with reference to Mr. Allen's health" (Pet. 5). Counsel also said that "had I known" my judgment would have been to try the case "on an entirely different basis" but "we were not aware of the situation detailed in the doctor's [post-trial] report . . ." (*id.*).

with this notion, and indeed prove the opposite, and neither the trial court nor the court of appeals found or suggested that defense counsel, after reasonable investigation, made a tactical decision to reject available defenses.

B. The Government states that the Tenth Circuit applied a farce and mockery standard (Opp. 5). While that standard is less favorable than the reasonable competence standard applied in some circuits, the Government asserts that "this case presents no occasion for the resolution of whatever differences may exist among the courts of appeals . . ." because "the trial record here convincingly demonstrates that the performance of petitioner's counsel was well 'within the range of competence demanded of attorneys in criminal cases.' " (Opp. 5). One might reasonably expect that such a sweeping assurance by the United States would be accompanied by record citations, a statement that one or more of the attorneys appearing on the opposition had read the record of the lengthy trial, or, at a minimum, some reasoning or explanation to support the assurance. None is tendered.

In any event, this Court sits to review rulings of law made by courts of appeals on the basis of the facts set forth in the court of appeals' opinion and any findings that may have been made by the district court. In this case, neither of the lower courts applied a reasonable competence standard, neither court found or alluded to facts that tended to support a conclusion that Allen's representation satisfied a reasonable competence standard, and neither court expressed confidence or satisfaction in the manner which Allen was represented at trial. The reasons stated by the lower courts in support of their rulings undermine the assertion that trial counsel's performance met a standard of reasonable competence. The trial court refused to grant a new trial because the evidence supporting the diminished capacity and insanity defenses "should have been discovered prior to trial through the exercise of due diligence" (Pet. App. 27a).[3] The court of appeals affirmed because granting a new trial "would put a premium on neglect and would encourage a strategy of not making use of available information, with the thought that later 'discovery' might be the basis for a new trial. . . ." (Pet. App. 11a).

C. Petitioner urged that the above quoted language of the Tenth Circuit shows it applied a new standard that is even more stringent than the "farce and mockery" standard. The Government's response is enigmatic (Opp. 5). It contends that "contrary to petitioner's assertion the court's language suggests not that it was applying a new, more stringent standard . . . but rather that it was legitimately concerned that defense lawyers might deliberately avoid presenting a defense at trial in the hope that the omission might be raised, if necessary, in a motion for a new trial or on appeal" (Opp. 5). We agree

[3] The district court found that trial counsel's failure to file a notice of appeal on behalf of co-defendant Central (Allen's wholly-owned corporation) was due to neglect (Pet. 5).

that this was one of two "concerns" expressed by the court—the other being a concern that "neglect" of counsel not be rewarded with a "premium." Indeed, these were the only two "concerns" or reasons advanced by the court in support of its ultimate conclusion that Allen should be denied relief. These concerns were not tied to the facts of this case but evidently were grounded in a theory of deterrence. The record is devoid of evidence suggesting that trial counsel in this case were engaging in a strategy of withholding a defense for later use. The Government points to no evidence suggesting that, nor did the court of appeals. In a legal system that is responsive to stare decisis, the "concerns" or reasons stated by the Tenth Circuit in this case presumably will serve as the standard for other cases where a claim of ineffective assistance of counsel is rooted in the failure of trial counsel reasonably to investigate and present a substantial defense available to the defendant. The new standard would authorize the denial of a new trial in cases where it has traditionally been deemed to be most deserved; for the court's "premium on neglect" rationale clearly authorizes lower courts to deny the victimized client a new trial because of his attorney's neglect, no matter how gross.

II. SECOND QUESTION.

The Government has managed to misconstrue entirely petitioner's second argument and, accordingly, has not replied to it at all. The misconstruction begins with the Government's statement of the issue: "Whether, in the circumstances of this case, the government was *required to prove* that petitioner had a fiduciary relationship with the victims of his mail fraud scheme." (Opp. 2; emphasis added.) That issue was raised below, but was not presented to this Court as a basis for granting review. The issue presented here is not whether the Government

was required to prove fiduciary duty, but whether the presence or absence of fiduciary duty was *relevant* to the mail fraud charges and central to petitioner's theory of the defense. Petitioner contends that the district court erred in instructing the jury that presence or absence of fiduciary duty was *irrelevant*.

The misconstruction extends to the Government's opening statement of petitioner's objection. Petitioner does *not*, contrary to the Government's assertion (Opp. 8), object "to the district court's instruction to the jury that the government was not required to prove, as an element of the crime of mail fraud, that a fiduciary relationship existed between petitioner and his customer." The instruction at issue is quoted at pages 17-18 of the Petition. Simple inspection demonstrates that it is not an instruction about the Government's burden of proof, but an instruction about what is relevant to guilt or innocence.

Finally, petitioner does not claim, as the Government states, "that the alleged non-disclosures in counts I-VIII could not have been fraudulent in the absence of a fiduciary relationship" (Opp. 8). The petition does not quarrel with the statement of the court of appeals that the Government introduced proof of affirmative misrepresentations tending to support the Government's theory of the case on counts IV, VI, and VIII. That statement is true but irrelevant, unless the Government is offering the novel theory that so long as the Government meets its burden of proof, there is no duty for the court to instruct the jury on the defendant's theory of the case. There is, of course, such a duty, long recognized by this Court. See Petition at 19. By instructing that fiduciary duty was irrelevant, the court deprived Allen of a substantial aspect of his defense. The Government misunderstands the argument and has offered no justification for condoning the result below.

CONCLUSION

For the reasons presented in the petition, a writ of certiorari should be issued to review the judgment of the Tenth Circuit.

Respectfully submitted,

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